

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4) MUR 4643
5 Democratic Party of New Mexico-Federal)
6 Judy Baker, as Treasurer)
7)
8 Democratic Party of New Mexico-Non-Federal (State))
9 Judy Baker, as Treasurer)
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13 **GENERAL COUNSEL'S REPORT # 4**

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16 **I. RECOMMENDATIONS:** Find probable cause to believe that the Democratic Party of New
17 Mexico-Federal and Judy Baker, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a)(2)(A),
18 441a(d)(3), 441b and 11 C.F.R. § 102.5(a)(1)(i); find probable cause to believe that the
19 Democratic Party of New Mexico-Non-Federal (State) and Judy Baker, as treasurer, violated
20 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i); approve the attached conciliation agreement for the
21 Democratic Party of New Mexico—Federal and Judy Baker, as treasurer, and the Democratic
22 Party of New Mexico—Non-Federal (State) and Judy Baker, as treasurer; authorize contingent
23 suit authority; approve the appropriate letters.
24

25 **II. BACKGROUND**

26 MUR 4643 involves an examination of disbursements made by the Democratic Party of
27 New Mexico during a special election period in the spring of 1997, which was the only election
28 held in New Mexico that year. The Democratic candidate in this race was Eric Serna, and his
29 authorized committee was the Friends of Eric Serna for Congress Committee ("Serna
30 Campaign"). The Federal Election Commission ("Commission") found reason to believe that the

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1 Democratic Party of New Mexico-Federal and its treasurer violated 2 U.S.C. §§ 434(b),
2 441a(a)(2)(A), 441a(d)(3), 441b and 11 C.F.R. § 102.5(a)(1)(i); and the Democratic Party of New
3 Mexico-Non-Federal (State) and its treasurer violated 2 U.S.C. § 441b and 11 C.F.R.
4 § 102.5(a)(1)(i) in making these disbursements on behalf of the Serna campaign.¹

5 This Office conducted an investigation which included depositions and the review of
6 documents from the respondents and witnesses. Based on this investigation, on January 29,
7 2002, this Office submitted the General Counsel's Brief to Respondent. On February 7, 2002,
8 this Office received a faxed letter from counsel for Respondent generally requesting copies of
9 deposition transcripts and an extension of time to respond to the General Counsel's Brief equal to
10 fifteen days from the date that the copies of all deposition transcripts are received. Respondent,
11 however, refused to sign a tolling agreement, and on February 12, 2002, the Commission denied
12 Respondent's requested extension, but granted Respondent two additional days (i.e., February 15,
13 2002) in which to file a response, authorized this Office to deny any further requested extension
14 in this matter absent an appropriate tolling agreement and approved the appropriate letter. On
15 late afternoon February 15, 2002, this Office received Respondent's response to the General
16 Counsel's Brief.

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¹ For the purpose of this Report, the term "Respondent," or "DPNM," shall refer collectively to the Democratic Party of New Mexico – Federal and Judy Baker, as treasurer, and the Democratic Party of New Mexico – Non-Federal (State) and Judy Baker, as treasurer.

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III. LEGAL ANALYSIS²

The General Counsel's Brief provides an analysis of the violations in this matter and is incorporated in this Report in its entirety.³ Respondent failed to dispute any of the facts enumerated in the General Counsel's Brief. Respondent's claim that the Party actually avoided coordination with the candidate (*see* p. 12 of Respondent's response brief) is conclusory and unsupported by the specific facts in this matter. As demonstrated in the General Counsel's Brief, the Serna campaign and the Party worked together in cooperation and in concert with each other, and the Serna campaign consulted the Party on various aspects of the campaign. Discussions between the Party and candidate's committee amounted to control by the Serna campaign over the contents, timing, location, mode or intended audience, or volume of communications by the Party. These communications allowed the Party to target limited resources for the benefit of the Serna campaign. As a result, the DPNM made excessive contributions to the Serna campaign, failed to report these contributions as coordinated expenditures and allocated 86% non-Federal money for disbursements in an exclusively federal special election and in a state that allows corporate and labor union contributions. *See* 2 U.S.C. §§ 434(b), 441a(a)(2)(A), 441a(d)(3), 441b and 11 C.F.R. § 102.5(a)(1)(i).

Respondent alleges three reasons as to why the Commission should not find probable cause to believe it violated the Federal Election Campaign Act of 1971, as amended ("the Act")

² In the First General Counsel's Report ("FGCR"), this Office indicated that it would request communications from the DPNM to determine whether the DPNM's mailings contained appropriate disclaimers and make recommendations, if appropriate, regarding disclaimer violations. The Commission did not find reason-to-believe that a disclaimer violation had occurred, and because this Office focused its resources on the coordination and allocation findings, this issue was not presented in the General Counsel's Brief.

³ Copies of the deposition transcripts relied upon in the Brief are available in the electronic format through the shared drive. A copy of the exhibits to each deposition transcript also is available in the Commission Secretary's office.

1 and should not pursue a civil penalty.⁴ First, Respondent erroneously states that enforcement of
2 this matter directly contradicts the plain text of the regulations and statutes. Second, Respondent
3 asserts that enforcement of this matter would violate due process and would be arbitrary and
4 capricious. Finally, Respondent alleges that enforcement of this matter would result in a
5 violation of Respondent's right to free speech and freedom of association. The United States
6 Supreme Court, however, in *Federal Election Commission v. Colorado Republican Federal*
7 *Campaign Committee*, 533 U.S. 431, 121 S.Ct. 2351 (2001), rejected the assertion that
8 restrictions or limits on party coordination violates free speech and freedom of association rights.

9 **Facts Not In Dispute.** Answers to interrogatories, depositions and documents provided
10 pursuant to Commission subpoenas reveal that the DPNM and the Serna campaign had regular
11 communications during the special election period from March 1, 1997, to May 13, 1997,
12 including discussions of state party budgeting, planning, voter drive and get-out-the-vote
13 ("GOTV") efforts. The DPNM reported making numerous disbursements totaling approximately
14 \$202,000 for absentee ballot applications and voter identification/GOTV efforts that were
15 specific as to the candidate, Eric Serna, and the Party used 86% non-Federal dollars
16 (approximately \$173,800) to make these disbursements. Respondent does not dispute these
17 facts.

18 Additionally, the DPNM reported coordinated expenditures of \$15,127 on behalf of Eric
19 Serna for the 1997 Special Election out of a possible \$31,810 coordinated expenditure limit.

⁴ In light of the impending statute of limitations, this Office has quickly prepared this General Counsel's Report addressing Respondent's response but will, of course, consider any supplemental information during the conciliation process.

1 Thus, the DPNM could have reported only an additional \$16,683 in coordinated expenditures
2 during the 1997 Special Election, placing the DPNM \$185,501.06 over the limits of
3 2 U.S.C. § 441a(d). Respondent does not dispute these facts.

4 The 1997 Special Election in New Mexico, in which Eric Serna ran as a candidate was
5 the only election in the entire state that calendar year. The DPNM reported over 83% of its
6 disbursements in 1997 during the special election period. Thus, clearly, the bulk of money
7 expended by the Party in 1997 focused on the special election to benefit Eric Serna in his
8 campaign. Respondent cannot dispute these facts and does not address them.

9 **Analysis.** Respondent relies on erroneous regulatory and constitutional interpretations in
10 opposition to a finding of probable cause in this matter.

11 The Party argues that its expenditures cannot be counted against candidate limits because
12 the expenditures were not “made on behalf of a clearly identified candidate.”

13 11 C.F.R. § 106.1(c)(2). An expenditure is made on behalf of a “clearly identified candidate”
14 when “(A) the name of the candidate involved appears; (B) a photograph or drawing of the
15 candidate appears; or (c) the identify of the candidate is apparent by unambiguous reference.”

16 2 U.S.C. § 431(18). The Party argues that “[a] voter who did not know who Eric Serna was
17 before seeing the communication would be just as ignorant afterward,” and therefore the identity
18 of the candidate is not “apparent” in ads urging viewers to “Vote Democratic.”⁵ DPNM
19 Response Brief, p. 6. This strained argument ignores the very language of the regulation, which
20 provides that unambiguous references include “the President,” “your Congressman,” and “the

⁵ Respondent continuously refers to General Counsel’s “factual and legal analysis.” Such references appear to apply to the General Counsel’s Brief submitted to Respondent on January 29, 2002, and this Office assumes, for the purposes of this Report, that such references are to the General Counsel’s Brief

1 Republican candidate for Senate in the State of Georgia,”⁶ – none of which would apprise a
2 television viewer of the name of the candidate. Moreover, the communications were made in a
3 year when there was only one election at stake. The references in the communications could
4 hardly be more “apparent.”

5 Respondent attempts to dismiss the allocation violation by citing the generic GOTV
6 provisions of 11 C.F.R. § 106.5(a)(2)(iv), which permits allocation of expenditures pertaining to
7 such activities when they do not mention a specific candidate. The regulation also covers “any
8 other activities that urge the general public to register, vote or support candidates of a particular
9 party...without mentioning a specific candidate.” 11 C.F.R. § 106.5(a)(2)(iv). As described in
10 the General Counsel’s Brief, however, activity pertaining to a clearly identified candidate does
11 not constitute generic activity and is not allocable pursuant to Section 106.5(a). *See* General
12 Counsel’s Brief, pp. 12-15. The Explanation and Justifications (E&J) written to accompany the
13 Federal Election Commission’s allocation regulations, published in the *Federal Register* in 1990,
14 specifically states:

15 Please note that all administrative expenses must be allocated between federal and non-
16 federal accounts, if incurred by a committee that makes disbursements in connection with
17 both federal and non-federal elections, and that chooses to pay any portion of such
18 disbursements from its non-federal account. Such committees must also allocate all costs
19 of generic voter drive activity, **except for get-out-the-vote drives conducted on behalf**
20 **of a wholly federal or wholly non-federal special election.** In contrast, fundraising
21 costs are allocable only when federal and non-federal funds are collected by one
22 committee through the same fundraising event. Similarly exempt activities are allocable
23 only when conducted in conjunction with non-federal election activities.
24

25 *Federal Register*, Vol. 55 No. 123, Column 1, Tuesday, June 26, 1990, Rules and Regulations
26 for allocation (i.e., 11 C.F.R. § 106.5) (emphasis added). Attachment 2. Thus,

⁶ See 11 C.F.R. § 100.17

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1 11 C.F.R. § 106.5, which comprises the allocation regulations authorizing allocation of federal
2 and non-federal political party committee accounts, is inapplicable where there is a wholly
3 federal special election.

4 Based on the above, the Commission should reject the Respondent's attempt to create a
5 new legal standard that is narrower than the applicable statute is drafted. This Office maintains
6 that 86% of Respondent's disbursements, i.e., \$173,878.29, were from non-Federal sources and
7 directly attributable to a clearly identified candidate in violation of 11 C.F.R. § 102.5(a)(1)(i).
8 Furthermore, since New Mexico state law permits corporate and labor union contributions,
9 Respondent has also violated 2 U.S.C. § 441b(a) by allocating non-Federal funds into a Federal
10 election, a provision not addressed in Respondent's response.

11 Respondent also asserts that its due process rights would be violated by enforcement of
12 this matter and cites *Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618, 341 U.S.App. D.C.
13 191 (D.C.Cir. 2000), in support of its position. Respondent's position is that the interpretation
14 upon which we refer to in the Advisory Opinion⁷ did not occur until after the fact. In the *Trinity*
15 case, however, the court held that a Federal Communications Commission regulation never
16 clearly defined the activity at issue. As stated above, the Act and the Commission's regulations
17 define "a clearly identified candidate" with "ascertainable certainty," *General Elec. Co. v. EPA*,
18 53 F.3d 1324, 1329 (D.C.Cir. 1995), in that "the identity of the candidate is apparent by
19 unambiguous reference." 2 U.S.C. § 431(18). Where Eric Serna was the only Democratic
20 candidate in the only election of 1997, advocating voters to "Vote Democratic on May 13, 1997"
21 constitutes an unambiguous reference to him. Respondent also cites to the 1996 campaign guide

⁷ See p. 11 of the General Counsel's Brief, referencing Advisory Opinion Number 1998-9

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1 in support of its position that Respondent was not on notice of the allocation provisions;
2 however, Respondent has been on notice since June 26, 1990, when the E&J, quoted above, was
3 published. Attachment 2.

4 Essentially, unable to dispute the facts in this matter, Respondent is left to argue that the
5 Commission should allow persons to violate the Act and claim ignorance of the law until the
6 point in time in which an advisory opinion or court case directly on point absolutely refutes it.

7 Respondent makes a similar due process assertion on the coordination issue. Respondent
8 suggests that the Commission ignore enforcement of any coordination cases in which there was
9 no clear legal standard, and cites in support *Colorado Republican Federal Campaign Committee*
10 *v. FEC*, 518 U.S. 604 (1996). This 1996 *Colorado* decision, however, merely removed the
11 automatic presumption that political party expenditures were coordinated expenditures. It did not
12 prohibit the Commission from enforcing prohibitions against excessive coordinated expenditures
13 recognized by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 431 (1976).

14 In some recent party coordination matters before the Commission, the Commission has
15 decided to exercise its prosecutorial discretion not to proceed. This Office acknowledges that
16 these matters involving party coordination (e.g., MURs 4538 and 4994) have presented
17 difficulties for members of the Commission because of differing views on, among other things,
18 whether the content of the communication must contain express advocacy. Although no court
19 has required express advocacy as an element of finding that an otherwise coordinated
20 communication was in connection with or for the purpose of influencing a federal election, the
21 communications in this matter, as presented in the General Counsel's Brief, expressly advocated
22 the election of a clearly identified candidate. To "Vote Democratic on May 13, 1997" in a year
23 in which only one election was held for only one office and that was a federal office can "have no

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1 other reasonable meaning than to urge the election...of one...clearly identified candidate...”

2 11 C.F.R. § 100.22(a).

3 Respondent also argues that enforcement of this matter would unconstitutionally abridge
4 its rights as a political party to speech and association, claiming such a position would effectively
5 prohibit parties from conducting meaningful GOTV efforts for special elections with only one
6 federal office at stake. The E&J cited above states that in a wholly federal special election a state
7 party committee may make disbursements for such GOTV activities only from federal funds.

8 Such GOTV communications would be subject to limitations if coordinated with the benefiting
9 candidate. In upholding limits on party-coordinated expenditures (2 U.S.C. § 441a(d)), the
10 Supreme Court rejected the Colorado Republican Campaign Committee’s speech and association
11 argument that parties could only effectively associate with their candidates by expending funds in
12 coordination with them. *Federal Election Commission v. Colorado Republican Federal*
13 *Campaign Committee*, 533 U.S. 431, 121 S.Ct. 2351, 2362-2363 (2001).

14 **Issue Ads.** In GCR#2, this Office requested authority to investigate additional mailings
15 that criticized Eric Serna’s Special Election opponent for his positions on specified issues and
16 encouraged the public to phone this candidate regarding such issues.⁸ Upon investigation and
17 questioning of deponents, this Office found no evidence of violations pertaining to these issue
18 ads and made no probable cause recommendation with regard to such additional mailings. These
19 mailings, therefore, are excluded from the disbursements listed in the General Counsel’s Brief.

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21 **IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

⁸ These mailings were obtained by Audit staff during a concurrent 2 U.S.C § 438(b) audit of the DPNM.

Attached is a proposed conciliation agreement

V. CONTINGENT SUIT AUTHORITY

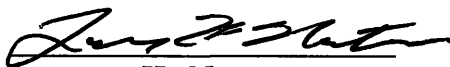
In an effort to streamline the enforcement process, this Office also is requesting contingent suit authority due to that fact that the statute of limitations for the DPNM begins to run on April 3, 2002, (five years from the date on which the first disbursement at issue was reported) and will run completely on May 15, 2002 (five years from the date on which the last disbursement at issue was reported). *See* 1997 DPNM disclosure reports: Twelfth day reporting preceding the Special Election on May 13, 1997 in the state of New Mexico; and Thirtieth day report following the Special Election on May 13, 1997 in the State of New Mexico.

VI. RECOMMENDATIONS

1. Find probable cause to believe that the Democratic Party of New Mexico-Federal and Judy Baker, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a)(2)(A), 441a(d)(3), 441b and 11 C.F.R. § 102.5(a)(1)(i).
2. Find probable cause to believe that the Democratic Party of New Mexico-Non-Federal (State) and Judy Baker, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i).
3. Approve the attached conciliation agreement for the Democratic Party of New Mexico—Federal and Judy Baker, as treasurer, and the Democratic Party of New Mexico—Non-Federal (State) and Judy Baker, as treasurer.
4. Authorize contingent suit authority.
5. Approve the appropriate letters.

2/22/02

Date



Lawrence H. Norton
General Counsel

Attachments

1. Proposed Conciliation Agreement
2. *Federal Register*, Vol. 55 No. 123, Tuesday, June 26, 1990, Rules and Regulations, excerpt from Explanation and Justifications for 11 C.F.R. § 106.5.

Staff assigned: Margaret J. Toalson

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